Old Dominion Freight Line, Inc. ***and*** **Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local Union No. 707, International Brotherhood of Teamsters, AFL–CIO** ***and*** **Ruben Fuentes.** Cases 29–CA–20002 and 29–CA–20944

May 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 23, 1998, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a letter in answer to the Respondent's cross-exceptions. The Respondent filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. In Case 29–CA–20002, the Union charged that the Respondent unlawfully discharged three union supporters, threatened employees with physical harm and plant closure, and falsely accused employees of bullying other employees into signing authorization cards. The parties settled the allegations, and the Regional Director approved the settlement on September 11, 1996.

On April 25, 1997, Ruben Fuentes filed a new unfair labor practice charge in Case 29–CA–20944. The General Counsel issued a consolidated complaint that vacated the settlement agreement in Case 29–CA–20002 and consolidated the unfair labor practice allegations of the two cases.

The judge found that the Respondent violated the Act by promising Fuentes a pay raise in August 1996 and granting him a pay raise on September 12, 1996. The judge dismissed all other allegations of the consolidated complaint.

In its cross-exceptions, the Respondent contends that the judge erred in rejecting its 10(b) defense to the Fuentes' pay allegations. For the reasons set forth below, we find merit in the Respondent's contention.

Citing *Redd-I, Inc.*, 290 NLRB 1115 (1988), the judge found that the pay raise allegations of the complaint are "closely related" to the other allegations of Fuentes' unfair labor practice charge. The judge, however, overlooked *Redd-I*'s additional requirement that the complaint allegations must be based on conduct occurring less than 6 months before the filing of the charge. That there are two parts to the *Redd-I* test was made clear by the Board when it quoted with approval from *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952), as follows:

> If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge. [290 NLRB at 1116.]

As the Board explained in *Columbia Portland Cement Co.*, 303 NLRB 880, 884 (1991), enfd. 979 F. 2d 460 (6th Cir. 1992):

> The General Counsel is permitted to add complaint allegations outside the 6-month 10(b) period if they are closely related to the allegations of a timely filed charge, and are based on conduct that occurred within 6 months of the filing of that charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988). [Emphasis added.]

Here the complaint allegations of Case 29–CA–20944 stem from the initial charge Fuentes filed on April 25, 1997, which the Region served on the Respondent by depositing it in the mail on April 30, 1997. Thus, only those complaint allegations involving conduct occurring after October 30, 1996, are timely within the limitations of Section 10(b) of the Act, and those allegations that involve conduct occurring prior thereto are time-barred by Section 10(b). Because the promise and grant of a pay raise to Fuentes found unlawful by the judge occurred in August and September 1996, outside the 10(b) period, those allegations cannot be found to be unfair labor practices includable in the April 25, 1997 charge, and must be dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found he was faced with "stark differences" between the testimony of Charging Party Fuentes, on the one hand, and the testimony of certain of the Respondent's witnesses, on the other. The judge found "all to be credible witnesses." Therefore, he dismissed several complaint allegations on the ground that the General Counsel had not carried his burden of proof. The Board has held that it is not improper for a judge to resolve disputed issues on this basis. *Blue Flash Express*, 109 NLRB 591, 591–592 (1954).

The judge, however, did not expressly address the conflict in the testimony pertaining to the complaint allegation that Terminal Manager Horvath unlawfully threatened Fuentes with discharge. (Fuentes testified, and Horvath denied, that such threats were made in January, February, and April 1997.) With respect to another disputed incident (whether antiunion statements were made during Fuentes' job interview), however, the judge explicitly found Horvath's denial to be "credible" and "again not possible to square with Fuentes' testimony." See par. 31 of the judge's decision. Therefore, we infer that the judge intended to credit Horvath's denial with respect to the threat-of-discharge allegations as well. Since the judge also generally found Fuentes to be a credible witness, we consequently dismiss the threat-of-discharge allegations on the ground that the General Counsel failed to sustain his burden of proof. *Blue Flash*, supra.

2. The judge found, and we agree, that the Respondent did not commit any other unfair labor practices after the settlement agreement in Case 29–CA–20944 was approved. Therefore, in accordance with established Board policy, we shall dismiss the consolidated complaint in its entirety and reinstate the settlement agreement. *Carlsen Porsche Audi*, 266 NLRB 141, 153 (1983).

ORDER

The consolidated complaint is dismissed.

IT IS FURTHER ORDERED that the settlement agreement in Case 29–CA–20002 is reinstated.

Sharon Chau, Esq., Brooklyn, New York, for the General Counsel.

W. T. Cranfill, Jr. and *John O. Pollard, Esqs. (McGuire, Woods, Battle & Boothe LLP),* Charlotte, North Carolina, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE**,** Administrative Law Judge. This case involves an unsuccessful effort by the Teamsters to organize the employees at a freight terminal in Bay Shore, New York, owned by Old Dominion Freight Line, Inc. (Old Dominion). Soon after union cards were distributed in May 1996, Old Dominion terminated three employees and unfair labor practice charges were filed. Following the General Counsel's issuance of a complaint on August 5, 1996, a settlement agreement was reached in September 1996 whereby the three employees waived reinstatement in return for Old Dominion's payment to them for any loss of earnings. Then, in December 1996, the Union lost the election and, in April 1997, Ruben Fuentes, another prounion employee, was discharged. So, on September 30, 1997, the General Counsel issued another complaint and revoked the settlement agreement.

The Respondent, Old Dominion, argued in its October 9, 1997 answer that the General Counsel improperly set aside the settlement agreement and that the matters in the original complaint should not be litigated. But in a trial held on March 16–17, 1998, in Brooklyn, New York, everything was litigated, contingent on a ruling whether the settlement was properly set aside. In that connection, the General Counsel called four witnesses, including two of the three employees discharged in May 1996, plus Ruben Fuentes. The Respondent then called seven witnesses. Finally, both parties filed briefs on May 14, 1998.

II. FINDINGS OF FACT

Old Dominion is a nonunion[1] freight transportation company based in High Point, North Carolina. It has 84 terminals throughout the United States, including one at Bay Shore, New York, which handles over $50,000 per year in interstate freight (G.C. Ex. 1(o); Tr. 407). At Bay Shore, trailers pull in after 11 p.m., and dock workers unload them and reload the contents on trucks for local delivery by drivers, who start their shifts at 8 a.m. The drivers then make their delivery runs and also pick up new freight, which is then brought back to the terminal for loading on trailers, which then depart for various interstate destinations (Tr. 49–51, 251).

William Horvath is the manager of the Bay Shore terminal (Tr. 250). He hired Ruben Fuentes as a truckdriver on February 29, 1996. According to Fuentes, Horvath said in the job interview that "[i]f you get involved in any Union matter, you are going to be immediately fired." (Tr. 18–19.) Horvath denied telling Fuentes that union activity was a ground for termination and likewise denied asking Fuentes what his position on unions was (Tr. 254–255).

Thomas Van Schaick, Jr., another driver, contacted Teamsters Local 707 in late April 1996 about the possibility of organizing the drivers and dock workers at the Bay Shore terminal (Tr. 159–161). Van Schaick received cards from the Union to be signed by the employees. To that end, he scheduled a meeting at a nearby bar on May 7, 1996, at which six employees, including himself, Fuentes, Dominick Liantonio, and Raymond Every signed cards expressing support for the Union (Tr. 22–23, 165, 178, 192). Van Schaick also talked to dockman Patrick Wescott that day about signing a card. According to Van Schaick, he told Wescott that if Wescott wanted to sign it was purely voluntary (Tr. 168, 183–184). According to Jeffrey Van Schaick (Tommy's brother), Tommy told Wescott that it was optional to sign the card and Wescott signed enthusiastically, saying that he needed better benefits because of a newborn in his family (Tr. 211–212). According to Liantonio, Wescott enthusiastically said that "we are going to screw the company" (Tr. 195).

Wescott, however, had a decidedly different version of events. According to Wescott, Tommy approached him 1 day at work and asked him to come to a trailer to look at something. Driver Every accompanied Van Schaick and Wescott inside the trailer, while Liantonio waited outside. After Van Schaick asked Wescott about signing a union card, Wescott hesitated, saying that he had a family and was worried about losing his job if he signed. Van Schaick then became agitated and came closer to him in the trailer, saying that everyone else was signing except one other driver, Ricardo.[2] But Wescott still declined to sign. All three men then left the trailer and Van Schaick and Liantonio went over to Ricardo's truck. Wescott saw Van Schaick arguing with Ricardo and pointing a finger at Ricardo, although he could not hear the conversation. Wescott then worked his regular nighttime shift. The next day, Van Schaick again asked him, this time in the breakroom, if he would sign, and Wescott again said he was undecided. Van Schaick again became agitated. Wescott then relented and signed a card, believing he would be physically hurt if he did not. Specifically, Wescott testified that he was afraid because he saw Van Schaick point a finger at Ricardo and because he had to wait for his ride home in the early morning darkness after his shift. After signing, Wescott felt ashamed. So, during his shift he told Supervisor Parker, at 1 a.m., that three drivers—Thomas Van Schaick, Liantonio, and Every—were pressuring other employees into signing union cards. Wescott left work early that Friday morning without completing his shift (Tr. 324–336).

At 7:30 a.m. on Friday, May 10, Van Schaick arrived to work. Horvath told Van Schaick to come to his office because someone was on the telephone wanting to talk to him. Van Schaick picked up the telephone and heard an unidentified voice threaten him because he was distributing union cards. After he hung up the telephone, Van Schaick told Horvath what the voice said. Horvath then asked if Van Schaick knew any-

[1] One of Respondent's terminals, in Masschusettes, became unionized but later the Union was decertified (Tr. 366, 377).

[2] Ricardo's last name appears to be L'Lantin according to R. Ex. 20, although the General Counsel says it's Lilantin.

thing about union cards and Van Schaick said no (Tr. 168–172).

Horvath learned later that morning about Wescott's early departure. After several unsuccessful attempts to call Wescott at home, Horvath finally reached Wescott and convinced him to meet at a 7-Eleven. Wescott told him that Van Schaick, Liantonio, and Every "got a little intimidating" regarding his signing of the union card (Tr. 284–285, 289). Horvath then told Wescott to write it down (Tr. 290), and Wescott did, stating:

> I told Parker Bescause I felt intimated. I work with these people. I was afraid for my safety standing on the corner at 4 AM that's why I signed the card.

(R. Exh. 14.) According to Fuentes, Wescott said that Horvath offered him a full-time job and better benefits if he wrote the statement (Tr. 25–28). But Fuentes failed to mention this in his pretrial affidavit (Tr. 108).

Upon returning to his office, Horvath talked with his superiors, Mark Madden, Old Dominion's northern regional manager, and Joel McCarty, the company general counsel. Horvath recommended that Van Schaick, Liantonio, and Every be fired. Madden and McCarty concurred. McCarty felt that the safety of the other employees was risked by the three drivers. However, Horvath never questioned the three drivers about the allegations, to get their sides of the story, before firing them (Tr. 292–294, 319, 394).

Van Schaick was recalled to the terminal after noon, where Horvath fired him for intimidating employees into signing union cards (Tr. 173–175). Horvath also fired Liantonio that same day, for the same reason. Liantonio told Horvath that he never intimidated any employee into signing (Tr. 193–194). And on Monday, May 13, Every was also terminated (R. Ex. 20; Tr. 294). Wescott arrived for his shift on Monday evening, unaware that the three drivers had been fired. Tom Demato gave Wescott a dirty look and said "they're at your house." At this point, Wescott left work and never returned, despite Horvath's 15 requests. Moreover, he moved his family to Atlanta, Georgia, where he obtained another job with Old Dominion (Tr. 339–342, 349).

On May 13, 1996, the Union filed a petition with the National Labor Relations Board, seeking to represent the drivers and dockmen at the Bay Shore terminal. And on May 14, the Union filed a charge with the Board regarding the termination of the three employees. On May 15, management held a meeting with the remaining employees. According to Fuentes, two of the Respondent's vice presidents from North Carolina spoke. Ernest Brently said that the Union was not good for Old Dominion and, at the one Massachusetts terminal that voted for a union, "they wasn't going to get any contract . . . . And most of the people that were there at the beginning, they are not there any longer because . . . they made it difficult for them." Fuentes added that John Yowell then spoke, saying that unionized freight companies are losing money and if the employees at the Bay Shore terminal unionized, Old Dominion "will have to shut the door down" because there would not be enough business. Fuentes then voiced his prounion sentiments in the meeting and Brently told him afterwards that "if you don't like it, you know what you . . . have to do" (Tr. 28–32). Jeffrey Van Schaick testified that Brently said that the terminal would likely close if the Union won the election because Old Dominion would lose money. But Van Schaick also testified that Brently said that most union terminals "were [operating] in the black." (Tr. 214–17) Brently and Yowell, however, both flatly denied saying that the terminal would close if the Union won (Tr. 375, 383). At some point after May 1996, Horvath asked Fuentes "how do you feel about it?" Fuentes told Horvath that he would vote against the Union (Tr. 33). Horvath denied asking Fuentes how he felt about the Union (Tr. 255).

During the election campaign, management held biweekly meetings with the employees (Tr. 47). At one such meeting in August 1996, Fuentes again testified that certain threats were made. Specifically, Brently repeated that Old Dominion would close the terminal if necessary. Yowell added that Old Dominion was "going under . . . because of the Unions." Also according to Fuentes, Supervisor Mark Madden promised him a $1.38 per hour pay raise and "a couple of weeks vacation" if the Union lost the election because Fuentes was an influential employee who could sway votes against the Union. Then, Fuentes told Madden that he would vote against the Union. However, Fuentes did not think that Madden believed him. Finally, referring to Van Schaick, Liantonio and Every, Madden said "those troublemakers, they are not going to come back again." And Madden also said that he needed a "son of a bitch" to manage the Bay Shore terminal properly (Tr. 34–42). Madden, however, testified that an employee merely asked him during a meeting if "those troublemakers" would be coming back. But Madden did not refer to the three discharged employees as troublemakers. Madden also denied making any antiunion threats or promising Fuentes a raise if Fuentes became antiunion. Further, Madden explained that Fuentes asked him about a pay raise first, and he said that Horvath's approval would be required. Horvath later agreed to Fuentes' request, but Madden said to wait until the NLRB case was settled. Madden also testified that he never discussed the subject of vacation with Fuentes (Tr. 358–363). Fuentes denied ever asking for a pay raise or vacation in his first year of work (Tr. 115, 119). But Horvath claimed that Fuentes had been asking for a pay raise since May 1996. Horvath always told him that, in accordance with Old Dominion policy, employees needed to wait 1 year for a raise (Tr. 257–258, 300).

On September 11, 1996, a settlement was reached between the Regional Director and Old Dominion, whereby the Company would post a notice and pay the three discharged employees backpay, in return for the dismissal of the August 5, 1996 complaint, and a waiver of reinstatement[3] (Tr. 187–189, 205–06; GC Ex. 1(o), (q)). On September 12, 1996, Fuentes received an hourly pay raise from $13.60 to $14.98 (R. Ex. 8). In this connection, Horvath felt that Fuentes was a good worker who deserved an early raise. Although Horvath had never done this for an employee before, company rules allow it (R. Ex. 4; Tr. 301). According to Fuentes, he also received a paid 1-week vacation a few weeks later. Again, the normal Old Dominion policy is to give employees paid vacation only after 1 year on the job (Tr. 43, 122, 386). However, Horvath denied that Fuentes ever received a vacation, and likewise denied ever discussing the subject of vacation with Fuentes (Tr. 259–260). Moreover, Old Dominion's personnel records reveal that the only vacation pay received by Fuentes was in April 1997, after his 1-year anniversary at Old Dominion (R. Ex. 19; Tr. 386–387).

[3] Every, Van Schaick, and Liantonio were to receive $13,005, $11,734.43, and $3,807.50, respectively.

Election day was December 5, 1996 (Tr. 46). Fuentes was an election observer for the Union. According to Fuentes, Madden told him on election day that Fuentes "made an ass out of him" by supporting the Union after receiving the pay raise and vacation pay (Tr. 51–53). Madden denied saying this (Tr. 363). The Union lost the vote (Tr. 53). No objections to the election were filed by the Union (G.C. Ex. 1(q); Tr. 377).

The day after the election, Fuentes testified that Madden said that the terminal "was going to be run differently." Specifically, infractions would now be noticed, such as tardiness (Tr. 47). Madden denied saying this. Indeed, according to Madden, attendance is a matter within Horvath's domain (Tr. 363). Also according to Fuentes, Horvath told him that management was going "to get more work out of you" (Tr. 57). In late January 1997, Horvath changed Fuentes' starting time from 8 to 7 a.m. because of an increase in workload (Tr. 58, 261). According to Fuentes, Horvath said that Brently had asked why Fuentes was still working there (Tr. 59). Fuentes added that Horvath said that Fuentes had to leave before any second vote on the Union (Tr. 75, 85). Horvath denied ever saying this to Fuentes (Tr. 284).

Horvath was happy with Fuentes' job performance as of January 1997 (Tr. 260). Indeed, management had always told him that he was doing well (Tr. 58). On January 15, 1997, Fuentes arrived at work at 8:09 a.m., instead of 8 a.m., because of traffic. For the first time, he received a written warning (G.C. Ex. 2; Tr. 60). But on prior occasions of tardiness, he was only 3 minutes late (Tr. 61). Another employee with whom Fuentes was driving to work that day was also similarly disciplined (R. Ex. 9; Tr. 64–65, 125). On February 27, 1997, Fuentes received another written discipline for failing to get a customer to sign a delivery receipt (R. Ex. 10; G.C. Ex. 3). This was a significant error, rarely made by drivers (Tr. 266–267). Also in February 1997, Fuentes received the wrong amount of money on a shipment from a customer (R. Exs. 11–12). Fuentes claimed that he immediately called the terminal office upon noticing the error and was told by Maryse Laszlo "don't worry about it." (Tr. 70–71) But Laszlo, a clerk, testified that Fuentes never told her about the error, and that she learned of it only subsequently (Tr. 367–368). The error concerned approximately $100 but it nevertheless caused additional work for Old Dominion to correct it (Tr. 270, 371, 381). So, Fuentes received another written warning on February 27 (G.C. Ex. 4). On March 31, 1997, Fuentes failed to get a complete description of the contents of one shipment he picked up. Fuentes conceded his error, but claimed that he did not know about the proper procedure for this until after March 1997 (Tr. 76–78, 135). So, Fuentes received another written discipline (G.C. Ex. 5). On April 2, 1997, Fuentes delivered a package of 17 cartons that was one carton short (R. Ex. 1; Tr. 79, 145). So, Fuentes received another written warning for failing to note on the delivery report that the cartons were shrink-wrapped (G.C. Ex. 6). But Fuentes disagreed with the write up, claiming that he did not want to lie on the delivery report by writing thereon that the cartons were shrink-wrapped. Instead, Fuentes said the cartons were merely taped together. But he did not note on the delivery report that the cartons were taped either (Tr. 140–142).

Fuentes confronted Horvath several times in early 1997 complaining that Horvath was trying to get rid of him for common, minor infractions (Tr. 147, 283). On April 15, 1997, Fuentes received a check from a customer that was improperly made out to Old Dominion, rather than the shipper. So, Horvath wrote up another warning, but tore it up in order to give Fuentes a chance to correct the matter (R. Ex. 13; Tr. 148–149). Finally, on April 18, 1997, Fuentes was fired for improperly soliciting business for another freight company; a claim he denied (Tr. 124, 150).

Fuentes filed a charge with the Board on April 25, 1997, alleging that he was unlawfully disciplined and terminated. The General Counsel issued his order revoking the settlement agreement and setting the entire case for trial on September 30, 1997, without any allegation, however, regarding Fuentes' discharge. Old Dominion's answer, filed on October 9, 1997, denied the 8(a)(1) and (a)(3) allegations, and contended that the General Counsel was estopped from relitigating the discharges of Van Schaick, Liantonio, and Every.

III. ANALYSIS

The General Counsel's case is more significant for what is not alleged and not sought by way of remedial relief. Specifically, no violation of the Act has been alleged regarding Fuentes' April 1997 discharge. Also, no rerun of the 1996 election has been sought. Instead, this case involves various 8(a)(1) allegations regarding the Respondent's conduct following the May 1996 discharges, and 8(a)(3) allegations regarding Fuentes' employment in late 1996 and early 1997. Further, because of this alleged misconduct following the settlement agreement, the General Counsel seeks to litigate at last the original matter in this case concerning the May 1996 discharges of Van Schaick, Liantonio, and Every.

A. Evidentiary Matters

At the trial, the Presiding Judge reserved ruling on General Counsel Exhibits 7, 8, and 9, and Respondent Exhibit 20. General Counsel Exhibits 7–9 concern the affidavit of Ray Every. The General Counsel claimed that it was unable to find Every, who apparently moved out of state, and thus offered his affidavit in lieu of live testimony. The Respondent naturally objected because it would be precluded from cross-examining Every. In support of its request to have the affidavit received, the General Counsel cited newly minted Federal Rule of Evidence 807.[4]

Every's affidavit will be rejected because it has virtually no evidentiary value. Other than innocuous background information and cumulative discussion about the May 1996 termination, Every writes therein about a 1994 antiunion remark made by a supervisor who was apparently not even employed at the Bay Shore terminal in 1996. And that remark has nothing to do with Local 707's 1996 organizing campaign. Moreover, in view of the resolution of the issue pertaining to Every, which lets the settlement stand, his affidavit is irrelevant.

Turning to the Respondent's Exhibit 20, it is a compilation of the number of written warnings issued to employees at Bay Shore from 1994 to 1997. This exhibit also provides some neutral, useful information about the employees. The General Counsel objected, however, to the portion regarding disciplines. But the Presiding Judge has not used Exhibit 20 to make any findings about written disciplines. So, Exhibit 20 will be received only for the limited purpose of establishing employees' identities, dates of hire, full or part-time status, and dates of termination.

Lastly, the General Counsel wrote a letter on June 2, 1998, replying to the Respondent's May 14 brief. Then, the Respon-

[4] Rule 807 is actually only renumbered Rule 803(24) and Rule 804(b)(5). They all read the same.

dent followed with its own June 12, 1998 letter responding to the General Counsel's brief. The Board's Rules, however, do not provide for the filing of reply briefs, or letters disguised as such. Moreover, neither party requested permission to file such a letter. Therefore, upon the Presiding Judge's own motion, both of these filings will be stricken.

B. Post-May 1996 Discharge Allegations

The Respondent's alleged misconduct after the discharges of the three drivers in May 1996 falls into three categories: (a) threats to employees in 1996 to close the Bay Shore terminal if the Union won, and threats to impose more onerous working conditions; (b) a grant of a pay raise and vacation to Fuentes in 1996 to encourage him to abandon his support of the Union; and (c) various written disciplines of Fuentes in 1997 to retaliate for his support of the Union.

Addressing the alleged threats by management first, Fuentes testified that on May 15, 1996, or just days after the three discharges, Old Dominion Vice President Brently came up from North Carolina and made implicit threats against the Union. Fuentes added that another North Carolina Vice President, John Yowell, told the employees that the Bay Shore terminal could not survive economically if the Union came in. Fuentes also testified that Brently and Yowell repeated these threats in August 1996. Further, Fuentes clamed that Madden, a vice president based in the New York area, referred to the three departed employees as "troublemakers" and threatened to get a "son of a bitch" to manage the terminal properly. Finally, Fuentes testified that Madden said in December 1996, just after the election, that things would be done different now, such as tightening up on tardiness and other infractions. Brently, Yowell, and Madden all denied Fuentes' allegations.

Notwithstanding the stark differences in the above-discussed testimonies, the Presiding Judge found Fuentes, Yowell, Brently, and Madden all to be credible witnesses. Having said that, it is concluded that the General Counsel has not proven, by a preponderance of the evidence, its allegations that the Respondent's supervisors threatened the employees from May 15, 1996 onward. First, three credible witnesses have denied Fuentes' allegations. For example, Madden adequately explained that the use of the loaded term "troublemakers" in an employee meeting originated with an employee. Also, Brently, who was in charge of the Respondent's election campaign, credibly testified that, as a 38-year veteran of union campaigns, he knows that threats to close down a company are illegal and "I wouldn't do that" (Tr. 373–375). Second, Jeffrey Van Schaick's testimony about Brently's remarks during the May 15, 1996 meeting is not of much help to the General Counsel. According to Van Schaick, Brently said that the Bay Shore terminal could not survive economically if the Union won the election. But Van Schaick also illogically maintained that Brently said in the same speech that most union terminals were operating "in the black." Clearly, Brently could not have made both statements. Thus, Van Schaick's version of Brently's first alleged statement is entitled to little weight. Therefore, the General Counsel has not proved the alleged threats by a preponderance of the evidence.[5]

[5] The rejected affidavit of Every (G.C. Ex. 7) is also of little help to the General Counsel's allegations. Specifically, Every only stated that a supervisor named Worthington said in 1994 that the terminal would close if a union came in. But this statement had nothing to do with Local 707's 1996 organizing campaign.

Turning to the alleged promise of a pay raise and vacation to Fuentes in August 1996, and granting thereof in September 1996, Fuentes claimed that Madden approached him during the union campaign with this "bribe" to turn against the Union. Madden insisted that it was Fuentes who initially asked him about a raise. Likewise, Horvath maintained that Fuentes had been asking him for a pay raise since May 1996, or just 3 months after being hired. In any event, the evidence clearly shows that Old Dominion gave Fuentes a $1.38 per hour raise on September 12, 1996. As for a paid vacation, which was likewise available to Old Dominion employees only after 1 year on the job, the evidence is fuzzier. While Fuentes testified that Madden made an unsolicited offer of "a couple of weeks vacation," both Madden and Horvath flatly denied ever talking with Fuentes about a vacation. And the Respondent's personnel records reveal no paid vacation was given to Fuentes until April 1997, which was well after the December 1996 election. But Fuentes testified that he received a paid 1-week vacation sometime in August or September 1996.

The evidence is too murky about the vacation. But regardless of who broached the subject first, it's clear that Horvath and Madden both approved an extraordinary pay raise to Fuentes, a leading union activist, in the midst of the election campaign. Although Horvath claimed that he did so in order to reward a good employee, it is far more significant that Horvath admitted that he had never before given an employee a raise prior to the 1-year anniversary date. Also, there is no specific evidence to support Old Dominion's contention, at page 29 of its brief, that such raises "are commonly given to workers during their first year of employment," at either Bay Shore or at any of the Respondent's 83 other terminals. Under the circumstances then, it is concluded that the Respondent's grant of an economic benefit was intended to discourage Fuentes' union activity. As such, it violated Section 8(a)(1) and (3). *NLRB v. Exchange Parts Co.,* 375 U.S. 405 (1964); *B & K Builders*, 325 NLRB 693 (1998).

Finally, the Respondent's 10(b) defense to this issue is rejected. In this regard, the September 1996 pay raise occurred seven months before Fuentes' April 1997 charge of unlawful written warnings and discharge. But the pay raise matter involves the same legal theory—Section 8(a)(1) and (3) of the Act—as the timely allegations discussed in paragraphs 30–32, infra. Also, the pay raise allegation arises from the same sequence of events in 1996–1997—i.e., the Respondent's response to the Union's organizing campaign. Finally, the Respondent raised similar defenses to the pay raise and discipline allegations: denying Fuentes' version of events. Thus, the pay raise allegation, first raised in the General Counsel's complaint, is "closely related" to the other timely allegations contained in Fuentes' charge, and therefore is not time-barred by Section 10(b) of the Act. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.,* 290 NLRB 1115 (1988).

The final post-settlement allegation involves the series of six written warnings issued by Horvath against Fuentes, from January to April 1997. According to the General Counsel, all of these warnings were in retaliation for Fuentes' prounion leadership during the unsuccessful election campaign. But the Respondent maintained that all of the job warnings were justified.

To prove its 8(a)(1) and (3) allegation, the General Counsel must establish, by a preponderance of the evidence, that Fuentes' union activity was a motivating factor in the Respon-

dent's decision to discipline him. If so established, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that these actions were based on lawful reasons unrelated to the employee's prounion status and/or protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); approved in *Transportation Management Corp.,* 462 U.S. 393 (1983). Applying the facts of the instant case, the Presiding Judge concludes that the General Counsel has proven that union animus was a factor motivating the Respondent's written warnings. While it is again not possible to square Fuentes' testimony that Horvath made antiunion remarks during Fuentes' job interview with Horvath's credible denial thereof, it is clear that the Respondent violated Section 8(a)(1) and (3) by granting an illegal pay raise to Fuentes in September 1996. And the intent of the pay raise was to soften and/or change Fuentes' prounion stance. Further, the timing of these warnings is significant: Fuentes' unblemished job record became blemished soon after the Union lost the election in December 1996. Lastly, the Respondent decided to terminate the three prounion drivers in May 1996 without giving any of them a chance to rebut Wescott's accusations. Thus, the General Counsel has satisfied his *Wright Line* burden.

But upon a thorough review of the evidence, it is also concluded that the Respondent has adequately justified all of the six job warnings issued against Fuentes. First, it is undisputed that Fuentes was 9 minutes late for work on January 15, 1997, that he had never been so late before, and that another driver who was also 9 minutes late was similarly disciplined. Second, Fuentes failed to get a delivery receipt signed by a customer on February 12; an error that the evidence shows to have been significant and rarely committed by drivers. Third, it is undisputed that Fuentes also collected the wrong amount of money from a customer on February 12, and that management's correction thereof required extra work. Fourth, Fuentes admitted that he failed to get the complete description of one package he picked up on March 31. The fifth written warning involved an April 2, 1997 delivery of 17 cartons that was one carton short. Fuentes maintained that the cartons were not shrink-wrapped, but management claimed that they were and that Fuentes should have written "shrink-wrapped" on the delivery report to absolve Old Dominion from responsibility. Regardless of whether the cartons were actually shrink-wrapped, Fuentes admitted that he also failed to write on the delivery report that they were taped together. Sixth and finally, it is clear that Fuentes received an incorrectly written check from a customer on April 15, 1997, and that Horvath initially tore up the written discipline to give Fuentes a chance to correct the error. In conclusion, the Respondent has adequately rebutted the General Counsel's showing by establishing that the written disciplines did not violate Section 8(a)(1) and (3).

C. The Settlement Agreement

To summarize things thus far, the Respondent violated Section 8(a)(l) and (3) by attempting to dampen Fuentes' union activity with a pay raise during the election campaign. The General Counsel contends that this single violation warrants the setting aside of the September 1996 settlement agreement and a decision on the original allegations regarding the discharges of Van Schaick, Liantonio, and Every. Specifically, the settlement agreement language, contained in the notice posted by the Respondent to its employees at the Bay Shore terminal, stated that:

> WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

The notice, however, said nothing about the Respondent refraining from granting pay increases or other benefits to employees. But the notice did state that Old Dominion would not discharge or discriminate against employees for supporting the Union, not threaten employees with physical harm or plant closure, and not falsely accuse employees of intimidating other employees into signing union cards. Also, the Respondent affirmatively promised to repay the three discharged drivers for lost wages and to expunge the discharges from the files.

The language requiring a Respondent to cease and desist from "in any other manner" restraining or coercing employees in the exercise of their Section 7 rights is warranted "only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Usually, however, the narrower language "in any like or related manner" is the proper phrasing for the "catch all" section of the cease and desist order. *Hickmott Foods*, 242 NLRB 1357 (1979). Without reaching the question of whether the settlement went too far in using the former "in any other manner language," which was meant to cover violations not alleged in the original complaint, the Presiding Judge concludes that Old Dominion's single violation does not warrant setting aside the settlement. First, as noted above, this violation ran afoul of no specific part of the settlement agreement; only the catch-all "in any other manner" section. Second, the Respondent complied with its affirmative obligations under the agreement, and the evidence fails to show any other violation of the agreement. Third, it is arguable that the pay raise violation predated the September 11, 1996 agreement. In this regard, Horvath approved the pay raise but Madden said that it should not be effective until the NLRB case was settled. And it wasn't until September 12, 1996. Fourth, it is concluded that the violation was both isolated and insubstantial. There is no evidence that the Respondent sought to confer any other benefit on any other employee. And, after all, the pay raise of $1.38 per hour was a benefit, not an adverse action against Fuentes. Under these circumstances, the Presiding Judge concludes that the Respondent did not violate the September 1996 settlement and that, accordingly, it should not be set aside. Compare *Oster Specialty Products*, 315 NLRB 67, 73–75 (1994). Thus, the allegations regarding the discharges of the three drivers contained in the General Counsel's first complaint of August 5, 1996 need not be decided.[6]

IV. CONCLUSIONS OF LAW

1. The Respondent, Old Dominion Freight Line, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local Union No. 707, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[6] All of the allegations concerning events after the May 10 and 13, 1996 discharges, including those before September 11, 1996, have been decided.

3. The General Counsel has failed to prove his allegations at paragraphs 2, 3, 14, 15(a) and (b), 16, 17, 18(b), 19, 20, 21, 22, 27, and 28 of the complaint.

4. Because the General Counsel improperly vacated the September 11, 1996 settlement agreement, the allegations at paragraphs 11, 12, 13, 23, 24, and 25 are dismissed and the settlement stands.

5. Pursuant to paragraphs 15(c), 18(a), 26, 29, and 30 of the complaint, the Respondent violated Section 8(a)(1) and (3) of the Act by promising, and granting, an early pay raise to Ruben Fuentes.

6. The unfair labor practice of the Respondent, described in paragraph 5, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]